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THE LEGALITY OF THE COMBINATION OF COMPETITORS UNDER THE SHERMAN ACT[1]

The question to what extent combination of competitors is permissible under the Sherman act is probably the most important unsettled question in the interpretation of the act. To the four other questions of prime importance relating to the scope of the act—viz., (1) Are corners illegal? (2) Are combinations for the purpose of boycotting illegal? (3) Are contracts for the maintenance of resale prices illegal? and (4) What restrictions does the act impose upon competitive methods—we either have fairly definite answers in so far as the fundamental principles are concerned, or the questions have been rendered academic by the Trade Commission act or by the Clayton act. *United States* v. *Patten*[2] holds that running a corner is contrary to the Sherman act. *Loewe* v. *Lawlor*[3] and *Eastern Retail Lumber Dealers' Association* v. *United*

[1] Because the statement of Mr. Justice Holmes in his dissent in the Northern Securities case (193 U.S. 197 at 403)—that the word "monopolize" in the second section of the Sherman act is synonymous with "restraint of trade" in the first section and that the second section is intended to apply to individuals the prohibitions which the first section applies to combinations—appears to be accepted by the court (*Standard Oil Co.* v. *United States*, 221 U.S. 1 at p. 61), for the sake of convenience the phrase "restaint of trade" alone will be used in the following discussion in referring to the objects of the prohibitions of the act.

[2] 225 U.S. 325.

[3] 208 U.S. 274.

States[1] establish that combinations for the purpose of boycotting violate the statute. *Dr. Miles Medical Co.* v. *John D. Parke & Sons Co.*[2] holds that a contract for the maintenance of resale prices violates the statute, even though the contract is between a single manufacturer and his dealers. The status of unfair competitive methods is less definitely settled because it has not been decided what methods are unfair and under what circumstances they are unfair. The principle seems to be definitely established, however, that the injury of a competitor's business by the use of unfair competitive methods is an undue restraint of trade.[3] The Trade Commission act definitely declares all unfair methods of competition to be illegal. As to what are unfair competitive methods, several of the most common and most important unfair practices—local price-cutting, use of bogus independents and "fighting brands" for the purpose of destroying competition, and tying contracts (when not reasonably necessary for the efficient and economical marketing of the commodity)—have been held unfair, at least when practiced by large and powerful combinations.[4] The Clayton act has a prohibition of doubtful value against price discrimination and an apparently effective one against "tying" contracts.[5]

[1] 234 U.S. 60. The question whether boycotting is a restraint of trade was under consideration also in *Grenada* v. *Mississippi*, 217 U.S. 600. The court held it to be a restraint of trade and a Mississippi statute prohibiting it as a restraint of trade to be a legitimate exercise of the police power in protection of the freedom of trade.

[2] 220 U.S. 373.

[3] In the Standard Oil case (221 U.S. 58) the court held that the act prohibited all agreements or acts which "had not been entered into, or performed with, the legitimate purpose of reasonably forwarding personal interest and developing trade," but "with the intent to do wrong to the general public and to limit the right of individuals."

[4] The leading cases on local price-cutting are *United States* v. *American Tobacco Co.*, 221 U.S. 106; *United States* v. *E.I. Dupont de Nemours & Co.*, 188 Fed. 127 (see also dissolution decree reprinted in Stevens, *Industrial Combinations and Trusts*, p. 469); *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733; 217 Fed. 656; *United States* v. *Hamburgh-American S.S. Line*, 216 Fed. 971; *United States* v. *Eastman Kodak Co.*, 226 Fed. 62. The leading cases on tying contracts are *United States* v. *American Tobacco Co.*, 221 U.S. 106; *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U.S. 20; *United States* v. *Pacific and Arctic Co.*, 228 U.S. 87; *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733; 217 Fed. 656; *United States* v. *Keystone Watch Case Co.*, 218 Fed. 502; *United States* v. *Eastman Kodak Co.*, 226 Fed. 62.

[5] Unless the courts shall hold the clause in section 2 of the Clayton act permitting discrimination in price on account of differences in grade, quality, or quantity to mean only "reasonable" discrimination, this section appears to be a "joker."

Section 3 of the Clayton act declares exclusive sales agreements and rebates based on exclusive dealing illegal when their effect is substantially to lessen competition or to tend to create monopoly.

The legality of the combination of competitors, however, remains in doubt. Numerous combinations have been dissolved under the act, but, with the exception of four cases, in every dissolution which has been passed upon by the Supreme Court there has been either proof or admission by demurrer of acts, such as oppression of competitors or exaction of exorbitant prices from consumers, which in themselves were recognized as restraints of trade.[1] Three cases in which there was no claim or admission of illegal practices—the Trans-Missouri Freight Association case,[2] the Joint-Traffic Association case,[3] and the Northern Securities Co. case[4]—occurred before the announcement of the "rule of reason" in the Standard Oil and Tobacco cases. The court expressly held that the combinations were illegal, regardless of the reasonableness of their actual practices and regardless of whether they were justified in order to prevent cut-throat competition. Two of the combinations—the Trans-Missouri Freight Association and the Joint-Traffic Association—were simply price-fixing organizations in which no unity of ownership and no unity of operation were created. Such combinations are less likely than consolidations to appeal to the courts as being necessary to realize economies of marketing or production. The Northern Securities Company created a unified ownership of the combining enterprises which might have developed into unification of the operating organization. The case, however, was decided by a closely divided court with strong dissenting opinions by the present Chief Justice and Mr. Justice Holmes. This case, moreover, was decided before the combination had been in operation a sufficient period of time to indicate whether

[1] The cases in which combinations of competitors have been dissolved or held illegal under the Sherman act by the Supreme Court, but in which practices illegal in themselves were present, are: *Addyston Pipe and Steel Co.* v. *United States*, 175 U.S. 211 (1899); *Montague* v. *Lowry*, 193 U.S. 38 (1904); *Swift & Co.* v. *United States*, 196 U.S. 375 (1905); *Bobbs Merrill Co.* v. *Straus*, 210 U.S. 339 (1908); *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U.S. 227 (1909); *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911); *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911); *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U.S. 20 (1912); *United States* v. *Reading Co.*, 226 U.S. 324 (1912); *Nash* v. *United States*, 229 U.S. 373 (1913); *Straus* v. *American Publishers' Association*, 231 U.S. 222 (1913); *Thomsen* v. *Cayser* (decided March 16, 1917), 61 U.S.L. ed. 353.

[2] *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

[3] *United States* v. *Joint-Traffic Association*, 171 U.S. 505 (1898).

[4] *Northern Securities Co.* v. *United States*, 193 S. 197 (19U.04).

its practices would be legal or illegal and does not, therefore, indicate whether a combination is subject to dissolution if during years of existence its practices have proven consistently legal.

The fourth instance of dissolution involving no illegal practices by the combination is the Union Pacific case.[1] This case followed the Standard Oil and Tobacco decisions. The combination was also an actual operating unification rather than a mere price-fixing arrangement. This case, therefore, would appear to express the present law upon the legality of combinations involving actual unification of operating organization which have been guilty of no specifically illegal practices. In a number of subsequent cases, however, the lower courts either have held contrary to the doctrine of the Union Pacific case or, where the point was not involved, have expressed *dicta* contrary to the case. Judge Sanborn's dissent in the Harvester case,[2] the opinion of the court in the Keystone Watch Case Company case,[3] the Hamburgh-American Line[4] and Prince Line cases,[5] the Steel Corporation case,[6] and the Eastman Kodak case[7] all hold that illegal practices or a clear illegal purpose in addition to the mere combination of competitive enterprises are necessary in order to violate the statute.[8]

[1] *United States* v. *Union Pacific R.R.*, 226 U.S. 61 (1912).

[2] 214 Fed. 987 (1914).

[3] 218 Fed. 502 (1915). This case, however, holds that if the question of the legality of the combination is raised shortly after the formation of the combination, before it has had a chance to demonstrate its character by its practices, the combination may be dissolved if there is a reasonable probability of restraint of trade resulting from the combination.

[4] 216 Fed. 671 (1914).

[5] 220 Fed. 230 (1915).

[6] 223 Fed. 55 (1915).

[7] 226 Fed. 62 (1915).

[8] *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733 and 217 Fed. 656, and *United States* v. *American Can Co.*, 230 Fed. 859 and 234 Fed. 1019, have also been interpreted as expressing the view that the mere combination of competitors is not enough to constitute a violation of the statute. This, however, seems a misinterpretation. The cases appear to have been decided upon the point that dissolution of the combination was unnecessary in order to restore competitive conditions. *United States* v. *St. Louis Terminal Railroad Association*, 224 U.S. 383, has also been referred to as authority that "good" trusts are not subject to dissolution despite their control over the market and the elimination of competition which they bring about. This interpretation is also erroneous. The St. Louis Terminal Association was not a good trust, in the sense that its practices had conformed with the law. The reason why it was not dissolved was that because of the peculiar circumstances of the case the association, when properly conducted, tended to *promote*, rather than to hinder, competition between the railroads entering St. Louis. This is radically different from a combination which hinders, rather than promotes, competition.

Thus the question whether combinations of competitors, in themselves, and regardless of the fact that their practices in no way restrain trade, may ever be in restraint of trade, and, if so, under what circumstances they restrain trade, still appears in doubt. Does the rule of reason penalize only combinations inflicting positive injury upon others, or does it also penalize the mere restriction of competition which results from the combination of competitors, regardless of its actual effect upon trade? If the latter, does the rule of reason distinguish between combinations in the form of mere price-fixing agreements and combinations involving some degree of operating unification and possibly bringing about operating economies? Combinations involving unification of operation may eliminate competition from the market even more effectively than mere price-fixing agreements between enterprises retaining their independence, and probably possess much greater power over the market than would the combination of the same companies by means of a price-fixing agreement. Does the fact that a consolidation of independent enterprises into a single operating organization eliminates competition and creates a power to dominate the market, in precisely the same way as a price-fixing agreement, vitiate the consolidation in all cases where a price-fixing agreement would be illegal, or does the rule of reason recognize that such consolidations are necessary to realize legitimate business purposes and permit them as long as they wield their power legally? What is the test of a "reasonable" combination? Is it the actual or the probable effects of the combination?

Section 7 of the Clayton act, which deals with combinations, renders no aid because it is confined to the prohibition of combination by the acquisition of stock or "other share capital" of one or several companies by another. It can be evaded by the outright purchase of the corporation's property. The constitutionality of the prohibition, in sec. 7, of the acquisition of stock or other share capital by one corporation in another or by a holding company in several companies "where the effect may be to substantially lessen competition" between the corporation making the acquisition and the corporation whose stock is acquired, or, in the case of a purchase by a holding company, between the several corporations whose stock is acquired, is doubtful. Every

acquisition of a controlling interest by one competing corporation in another or by a holding company in several competing corporations necessarily eliminates competition between the corporations, if the control is exercised. If the corporations are in competition for a substantial proportion of their business, the result would be a "substantial" lessening of competition between the corporations, contrary to the prohibition of the statute. The question is whether this prohibition is so closely related to the prevention of restraint of trade as to bring it within the power of Congress to regulate commerce. Although it is well settled that the prohibition of the acquisition of property may be sufficiently related to the protection of commerce from restraint as to be justified as an exercise of the power to regulate commerce, there is a limit beyond which the prohibition of the acquisition of property ceases to be an appropriate means of preventing unreasonable restraints of trade. This limit would seem to be passed by a prohibition against the acquisition of a controlling interest in any corporation which competed to a "substantial" extent with the acquiring corporation or by a third company in several competitors, regardless of how insignificant was the proportion of the line of business controlled by the competitors.

The provision is also open to the attack that it limits the freedom of contract, contrary to the Fifth Amendment, on the same ground, that the restriction on the freedom to acquire property is greater than is reasonably necessary to protect trade from undue restraints.

Should this provision of the section be held void, the prohibition of the section would be limited to the acquisition of stock by one of two competitors in the other or by a holding company in several competitors where the effect may be "to restrain . . . . commerce in any section or community, or tend to create a monopoly of any line of commerce." This is substantially the same prohibition as the Sherman act contains, and the same principles which apply in the interpretation of the Sherman act would apply in the interpretation of this section.

I

Before discussing the controversy between those who hold that combination *per se* may be a violation of the statute and those who insist that something more is necessary, it may be desirable to clear

up a possible source of confusion. The question may be raised how the argument that combinations of competitors may not in themselves be a restraint of trade can be reconciled with the fact that such combinations have been dissolved. If it is the acts of the combination rather than the combination itself which are illegal, why is not an injunction against the wrongful acts sufficient? Does not the fact that combinations have been dissolved indicate that there is inherent in combinations something which violates the act?

The dissolutions cannot be explained on the ground that they are a penalty for transgressing the statute, for dissolution is the act of a court of equity. Equity acts to remove existing or to prevent future wrongs but not to inflict penalties for past wrongs.

When an injunction will give effective relief, the rule apparently is that an injunction will be the remedy.[1] There are cases, however, in which an injunction will not furnish effective relief. Such may be the case when the combination controls prices. It is well established that the exaction of extortionate prices by a monopolistic combination is a restraint of trade. The principles which determine what is a fair price are complicated and not worked out. The ascertainment of the facts necessary to determine what is a fair price is an equally formidable task. The courts are unequipped,

[1] *United States* v. *St. Louis Terminal Railroad Association* (224 U.S. 383). In this case a terminal railroad association was found guilty of discriminatory practices in restraint of trade. The court found, however, that the illegal practices could be prevented without dissolving the combination and held that the decree should be confined to the prohibition of the offending practices. The court said: "If, as we have pointed out, the violation of the statute, in view of the inherent physical conditions, grows out of administrative conditions which may be eliminated and the obvious advantages of unification preserved, such a modification of the agreement between the Terminal Co. and the proprietory companies as shall constitute the former the bona fide agent and servant of every railroad line which shall use its facilities, and an inhibition of certain methods of administration to which we have referred, will amply indicate the wise purpose of the statute and will preserve to the public a system of great public advantage."

In *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733 and 217 Fed. 656, a combination of towing companies controlling 90 per cent of the business in fourteen lake ports was found guilty of violating the anti-trust act. The court held that, since without certain practices in conducting the business there would have been no violation of the act and since the illegal practices would be adequately prevented by an injunction, an injunction was all the relief that would be given.

both by training and by experience, to deal with each of these problems. Even should the court surmount these obstacles and ascertain what is a fair price, its labor would be wasted, for, with constantly changing costs and market conditions, what would be a fair price today would not be a fair price tomorrow. On account of these conditions an injunction against a combination charging more than reasonable prices or more than any specific price would utterly fail to give adequate relief. The only way to give relief in such a case is to attempt to restore competition by breaking up the combination. This appears to be one basis for the dissolutions in the Standard Oil, Tobacco, and Powder cases. The American Can Company case, in which the court found that the company influenced prices, but refused to dissolve the consolidation on the ground that its influence was declining and would probably disappear within a reasonable time without the aid of judicial action, indicates also that control of prices, when no immediate relief is in sight, may furnish ground for dissolution.[1]

When a combination has exhibited a persistent and deeply seated tendency to resort to unfair and oppressive practices, the court, taking into account the difficulties of proof, the delay and expense of ascertaining whether the combination shall actually have complied with an injunction, and the fact that when great power is possessed there is a peculiar temptation to resort to oppressive practices, may deem it expedient to dissolve the combination, although an injunction possibly might furnish adequate relief. This was the view of the district court in the Corn Products Co. case—a case now before the Supreme Court on appeal.[2] In the

[1] In this case (234 Fed. 1019) the court said: "The defendant does fix the prices at which an overwhelming majority of the packers' cans are sold. It is the most potent factor in determining the price at which all of them are disposed, but its power to do so depends upon its making a fairly accurate estimate of market conditions. Any considerable increase in prices would promptly bring a host of new competitors into the field. It is neither certain nor probable that it will be able to maintain its relative position in the field. The business and resources of some of its competitors have been steadily growing, both relatively and absolutely. A continuation of the present conditions may well result in the development of some of them until competition will again control the market. It is by no means unlikely that this result may be attained even earlier than the public could begin to enjoy the benefits which the government hopes a dissolution would immediately confer."

[2] 234 Fed. 964. The court said (p. 1018): "None of these considerations seem to me sufficient to prevail over the wisdom of disintegrating a combination which has

Great Lakes Towing Company[1] and the American Can Company cases,[2] however, long-continued and flagrant violations of the act did not cause the combinations to be dissolved in spite of the vigorous contention of the prosecution that dissolution was necessary in order to give adequate relief.

II

The supporters of the theory that the mere combination of competitors may violate the statute are confronted with the problem of showing wherein the mere union of previously independent competitors creates a restraint of trade. It is evident that the combination by wrongful practices may restrain trade, but, if the practices of the combination are exemplary, what is there in the unification of competitors which subjects it to attack?

The supporters of the theory that mere combination may be illegal advance two principal arguments to prove that a combination of competitors may be illegal although its practices are legal:

1. The destruction or material restriction of the general operation of competition which results from the general unification of competitors in a given field of business is in itself a restraint of trade. This is so, regardless of the fact that the combination imposes no restrictions upon the freedom of any trader nor deliberately impedes the course of trade in any way, and even though there may appear no danger that the combination in the future may

shown such an inveterate and incorrigible insistence upon interfering with the course of commerce which the law demands. . . . . The suit is, it is true, not punitive in character, but the stockholders are in such cases responsible for the conduct of the business by the officers in charge. Such loss as is involved in removing from their hands the power which they have so persistently used contrary to law is an inevitable, though unfortunate, incident in the enforcement of the statute.

"In all cases where the history of the combination has been such as this, the Supreme Court has declined to rest upon injunctions alone. The difficulties of proof, the delay, the cumbersome inquiry necessary to ascertain again whether the defendant shall have actually discontinued, all make against such a limitation. It may be safely assumed that evidence, such as was by chance available here, of the actual purposes of those in charge will never again exist. Without it, perhaps, it is doubtful whether the case could have been proved. Yet it is a reasonable assurance to take that, when an innate proclivity has so abundantly manifested itself over a period of years, it shall be disabled from further opportunity. No case, it seems to me, could more require a remedy, unless injunctions are to serve for the only remedy."

[1] 208 Fed. 733 and especially 217 Fed. 964.

[2] 230 Fed. 859 and especially 234 Fed. 1019.

deliberately impede the course of trade by the exaction of unreasonable prices, the deterioration of goods or service, or the use of unfair practices. The argument is based on the theory that the prevalence of competition is promotive of the development of industry, of the discovery and adoption of new processes, and of a stimulus to serve the public, and that, when this stimulating influence of competition is substantially interfered with by the combination of a sufficient number of competitors, trade is restrained, even though no person in particular suffers any specifically ascertainable restriction of his freedom to buy and sell.

2. The statute is directed against the mere undue *power* over trade, as well as the positive impediments imposed upon the freedom of trade, when such power is obtained by the artificial means of combining independent plants rather than by normal growth. The reason for this is the danger, said to amount almost to a certainty, that dominating power over a market, when possessed, will be wrongfully exercised to the detriment of the public or of competitors of the combination.[1]

The first of these objections relates to the general and unpremeditated influence which a great combination, resulting in the destruction or substantial limitation of competition, exerts upon the development of trade—an effect entirely independent of possible deliberate wrongful practices of the combination. The second relates to the specific injuries which may follow from the exercise

[1] A third possible reason why a combination may be illegal is that it is formed with an illegal purpose. Direct proof of such purpose is rarely possible. It may be shown by the acts of the combination, which, even though apparently innocent and harmless when considered individually, may reveal an illegal purpose when considered collectively and as parts of a general plan (*Swift & Co.* v. *United States*, 196 U.S. 375 at p. 396). In such a case, however, the combination would fall in the class of combinations illegal because of their acts rather than because of their inherent nature. It may be shown, also, by the extent of the control acquired over the market (*United States* v. *Reading Co.*, 226 U.S. 324 at p. 370). This is an unsatisfactory test because it is generally possible to urge that the large combination is required to accomplish some legitimate purpose, such as the prevention of cut-throat competition or the realization of operating economies. Finally, the circumstances of the formation of the combination and perhaps the nature of its organization (as in the case of mere price agreements) may indicate an illegal purpose. Here again it is frequently possible to urge a legitimate purpose, such as prevention of cut-throat competition. A subjective test, such as purpose, is highly unsatisfactory, and objective tests, where possible, should be substituted.

of its power in an oppressive manner. Neither of these arguments, however, relates at all to the elimination of competition caused by the combination of several competitors controlling an insignificant portion of the business. Expressions of opinion to the effect that every combination which eliminates competition between any two competitors, regardless of how small and insignificant, is a restraint of trade under the Sherman act are found, it is true, in the opinions of the lower courts in the Standard Oil and Tobacco cases. This, however, has never been the predominant view of the courts. Even in the Joint-Traffic Association case, before the adoption of the "rule of reason," the court expressly stated that the mere combination of competitors is not in every case illegal.[1] It is recognized that the combination of small and weak competitors, by increasing their competitive power, may stimulate rather than impair competition in the field of business as a whole, and it is with the general competitive situation that the law is concerned.

The answer of those who insist that the mere combination of competitors does not violate the statute to the argument that the general elimination or restriction of competition in a field of business in itself restrains trade, because it brings about a slackening in the development of industry and a lessened incentive to serve the public, is that it is based upon too broad a conception of restraint of trade. The more extreme of those who insist upon a narrow construction of restraint of trade hold that restraint of trade refers simply to impediments upon men's freedom to engage in business—that is, to the acts or agreements which tend to exclude them from certain callings or lines of business. The restraint may be either subjective or objective—subjective when imposed by a man on himself by a contract in which he restricts his freedom to pursue

[1] 171 U.S. 505 (1898). Mr. Justice Peckham said (p. 567): "We might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same persons to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, a manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within the legal definition of that term."

a certain calling or business; or objective when imposed by strangers in the form of unfair and predatory competitive methods, threats, and coercion tending to drive out those who are in the business and to prevent outsiders from entering. This conception of restraint of trade does not include oppression of consumers, such as the exaction of extortionate prices, the limitation of output, or the deterioration of the quality of goods or service. It has never been followed by the Supreme Court and is now definitely discredited. It is best represented by Mr. Justice Holmes's dissent in the Northern Securities case[1] and by a Massachusetts case.[2]

The more moderate of those who insist upon a narrow construction of restraint of trade contend that restraint of trade includes every definite and specific restriction upon the freedom of others to buy or sell or conduct their business as they see fit. This concept includes the oppression of consumers as well as of competitors. As the use of many legitimate business methods involves a restriction of someone's freedom to buy, sell, or conduct his business as he sees fit, the restraint of trade condemned by the statute must be those restrictions on freedom either accomplished by unfair methods or carried to an unreasonable extent. The effect of a combination upon the freedom of others to trade may be considered from three points of view:[3] (1) its effect upon the competitors or

[1] 193 U.S. 197 at pp. 403–5.

[2] *Central Shade Roller Co.* v. *Cushman*, 143 Mass. 353 (1887). *In re Greene* 52 Fed. 104, at p. 116 holds exclusion of others an essential of monopoly.

[3] In the Standard Oil case (221 U.S. 1 at p. 52) Chief Justice White defined the evils which caused monopolies to be held illegal and which, he states later, became the basis for holding combinations to be illegal as in restraint of trade, as follows: "(1) The power which the monopoly gave to the one who enjoyed it, to fix the price and thereby injure the public; (2) the power which it engendered of enabling a limitation on production; and (3) the danger of deterioration in quality of the monopolized article, which, it was deemed, was the inevitable resultant of the monopolistic control over its production and sale."

In the Keystone Watch Case Company case (218 Fed. 502 at p. 518) Judge McPherson gives a broader interpretation of the manner in which trade may be restrained. He says: "Competitors must not be oppressed or coerced; fraudulent or oppressive rivalry must not be pursued. . . . . Then, too, prices must not be arbitrarily fixed or maintained. Ordinarily the play of the great forces that influence the market will determine prices, and these forces must be allowed to have their unhindered effect. And a corollary from this consideration is that an artificial scarcity must not be produced, since the effect of such a scarcity is to raise prices to the consumer. Moreover, the public is injured if the quality be impaired, so that the old price buys a

prospective competitors of the combination; (2) its effect upon the customers, either of the combination or of its competitors, and its effect upon the enterprises supplying it or its competitors with raw materials and supplies[1]; (3) the effect upon the freedom of the enterprises composing the combination.

worse article; and other injuries are done, if the wages of the laborer be arbitrarily reduced and if the price of raw material be artificially depressed."

In his dissenting opinion in the Harvester case (214 Fed. 1014) Judge Sanborn says that the only restraints prohibited by the act are those which unduly injure the public by "(1) raising the prices to the consumers of the article which they affect, (2) limiting their production, (3) deteriorating their quality, (4) decreasing the wages of the laborers and the prices of the materials required to produce them, or (5) practicing unfair and oppressive treatment of competitors."

Judge Buffington in the Steel Trust decision (223 Fed. 55 at p. 61) gives a similar interpretation of the manner in which trade may be restrained. Referring to the statement of the Supreme Court in *Nash* v. *United States* (229 U.S. 373) that "only such contracts and combinations are within the act, as by reason of interest or the inherent nature of the contemplated acts prejudice public interests by unduly restricting competition or unduly obstructing the course of trade," he says: "The public interests thus prejudiced consist of, first, competitors in trade; second, the purchasing public; and, third, the general public. For example, if this Steel Company was in any way guilty of unfair business competition, if it was guilty of such conduct as to unfairly force a competitor out of the steel business, or if it unfairly prevented those who wanted to go into the steel business from doing so, then the Steel Company was, in the judgment of the Supreme Court, prejudicing the public interests by unfairly driving individuals out of business or preventing them from entering it, and it was also injuring the public by unduly restraining trade. So, also, if this Steel Company was restricting output in order to exact unfair price, if it was buying up competing plants and dismantling them to needlessly restrict output, if it was by reason of its controlling power furnishing the public with inferior goods, if it was using its power needlessly and unfairly to reduce wages, if it was seeking to deceive purchasers by false appearances of competition, when in fact it owned or controlled such seeming competition—then it was prejudicing, not only that part of the public which desired to buy steel, but the public interests generally by unduly obstructing the course of trade and thereby preventing the steel business from moving in its natural and normal channel.

"A study of the various anti-trust cases shows that such unfair, prejudicial acts as we have thus instanced have been found where the Sherman law has been held to have been violated."

[1] Since combinations to raise wages are no longer at common law combinations in restraint of trade, at least in so far as their direct effect upon wages is concerned (labor now being held by the common law not to be a commodity), the artificial depression of wages by a capitalistic combination would likewise not appear to be a restraint of trade. But even if the artificial depression of wages by a combination of capital be a restraint of trade, the question still remains whether it is a restraint of *interstate* commerce, assuming the products manufactured by the workers were intended for sale in other states. Wage bargains made locally between the employer and his workers for the sale of labor in the same place, even though the labor was to be employed on products intended for interstate commerce, would not appear to be interstate commerce any more than a local sale of coal to be consumed in the locality in the manufacture of products for interstate commerce.

The combination may restrict the freedom of its competitors or of prospective competitors by the threatened or actual use of all manner of unfair competitive methods, such as predatory price-cutting, boycotting, or discrimination against those doing business with the competitors or prospective competitors of the combination, and by restrictions in the contracts of those selling out to the combination against their re-entering the business in competition with the combination.

The combination may restrict the freedom of those buying from, or selling to, it or its competitors (*a*) by discriminating against persons dealing with its competitors, (*b*) by using its control over the market to bring about a general increase of prices to an unreasonable level, thus unreasonably restricting the public's ability to procure the goods, the prices of which have been increased, (*c*) by unreasonably depressing the prices of materials and supplies used by it, making it difficult or impossible for dealers in them to procure a fair profit, except through the exaction of unreasonable prices from third parties, or (*d*) by failure to render adequate service, either by unduly limiting production or by deteriorating quality.

The freedom of the enterprises composing a combination may be restricted, when they retain their separate identity, by the delegation of the control of their business to the combination. This is one of the reasons for the illegality of pools and joint selling agencies.[1] In the case of the outright sale of a business to a consolidation or of the purchase of a controlling stock interest by a consolidation, this issue is not raised, since the control and ownership are not divorced.

Concrete and specific restrictions upon the freedom to buy or sell such as those mentioned above, most supporters of the "specific impediment" theory of restraint of trade would doubtless concede to be embraced by the statute. None of these forms of restriction, however, directly and necessarily follow from the formation of a combination. The combination may pay and charge reasonable prices,

[1] *United States* v. *Joint-Traffic Association*, 171 U.S. 505 at pp. 563, 564; *Addyston Pipe and Steel Co.* v. *United States*, 175 U.S. 211 at p. 245; *Continental Wall Paper Co.* v. *Voight*, 212 U.S. at p. 256.

and may confine itself to the use of fair competitive methods. In order to impose restraints of this direct and specific character, the combination must resort to wrongful practices. The mere existence of the combination does not cause restraints of this kind.

Two questions arise in connection with the problem whether the slackening of the development of industry and the lessening of the incentive to serve the public, which are said to follow the elimination or substantial limitation of competition, should cause combinations seriously limiting competition in their field of business to be held in restraint of trade. They are:

1. In case the combination imposes no restrictions upon the freedom of anyone who chooses to enter the field in competition with it, should the combination be held responsible if competition fails to spring up?

2. Is not the likelihood that the results feared will be realized too remote to justify condemning a combination because of the possibility that they will be realized?

In connection with the first question it is pointed out that, although the formation of the combination may cause a substantial limitation upon competitive activity in the field of business, the continuance of the combination does not mean that competition is excluded from the field of business. As long as the combination abstains from unfair competitive methods, competitors are free to enter the field on fair terms. If they do not choose to enter under these circumstances, it is contended that it is unreasonable to hold the combination responsible for the lack of substantial competition in the field. Such an extraordinary situation as substantial competition failing to spring up when assured of fair treatment probably would be due only to the ability of the combination to render superior service. To condemn the combination in that case because competition failed to spring up would be to condemn it for its efficiency.

In connection with the second question a distinction is drawn between the power of competition to affect price and its power to stimulate technical progress and attentive service. Price competition is ordinarily the most severe form of competition. Greater competitive strength is required to produce price competition than

to produce service competition or to stimulate technical progress. Although many combinations have been formed which have been able substantially to eliminate price competition, few, if any, have so completely dominated the market as not to leave a powerful stimulus for technical development and efficient service to the public.[1]

But, granting the possibility of a combination so thoroughly eliminating competition as to lessen materially the incentive for technical progress and for efficient service, it is contended that the likelihood that the incentive will fail to be restored is too remote to justify condemning the combination in advance because competition *might* fail to develop. It is pointed out that there is practically no field of industry in which competition has failed to increase in strength subsequent to the formation of a combination. The competition, it is true, has not always been strong enough to introduce serious price competition. Perhaps the competitors have not desired that. It has in general been strong enough, however, to stimulate technical development and to sustain a keen incentive to serve the public well. The harvester, steel, can, glucose, and sugar industries come to mind, in which there has been a considerable growth of new and old competitors of combinations. Even the Standard Oil Company, which has probably occupied as strong a position in the market as any combination and whose ruthless competitive methods naturally have discouraged the entrance of competitors, has always had substantial competition to deal with. Although the high costs of the independents have made it impossible for them to affect prices as they otherwise might, it is safe to assert that they have been a material spur to technical progress and to better service. In view of the virtual certainty that competition, if given a fair chance, will spring up with sufficient strength at least

[1] There appears to be a tendency also for large combinations to become bellwethers with respect to price changes. The combination may not possess sufficient power to increase prices regardless of competition, but the changes initiated by the combination are the signal for similar action on the part of independents. In this way the combination becomes an instrumentality for introducing uniform price policy into the trade. These informal communities of interest have been ignored in the past probably because it has been felt that they were too unstable to be formidable. With the growth in co-operative spirit in business, there is reason to believe that these communities of interest may become highly important.

to provide a substantial stimulus to technical development and to attentive service, it is contended that it is highly unjust to condemn combinations *in advance* upon the ground that they lessen the stimulus to technical progress and to efficient service.

III

The second contention of those who hold that the mere combination of competitors may violate the statute, irrespective of the practices of the combination, is that restraint of trade as used in the statute embraces the mere *power* to dominate a field of business, when such power is created by the unification of competitors, regardless of whether the power is injuriously exercised or not. A combination of competitors which is the means of creating such power is therefore by that very fact illegal, regardless of its conduct.

Those who insist that actual unreasonable impediments upon someone's freedom to buy or sell are necessary to constitute restraint of trade answer that this argument disregards the plain words of the statute. The statute says nothing about mere undue power over trade. It simply prohibits combinations which restrain trade. This must mean the actual imposition of unreasonable impediments upon the freedom of someone to buy or to sell or to conduct his business as he sees fit, not simply the mere possession of great power over a field of business. The possession of extraordinary power sufficient to enable the possessor seriously to oppress others, should he care to exercise it, is one thing; the actual oppressive use of the power is another thing. When combinations have dominated a field of business, perhaps the usual result has been that they have used their power to restrict the freedom of others. The fact, however, remains that the mere possession of the power does not necessarily mean that oppression will result. The statute deals with actual restraints imposed on trade, not probable or conjectural restraints. It furnishes no ground for holding a combination to be in restraint of trade as a matter of law, regardless of whether as a matter of fact it has restrained trade.

To hold combinations illegal because of their power over trade rather than because of their actual effect upon it violates the spirit and the purpose of the statute. The purpose of the statute is not

to restrict but to preserve the freedom of trade. It imposes restrictions merely to prevent individuals from imposing greater ones. Because its purpose is to promote rather than to restrict the freedom of trade, it should be interpreted as restricting individual liberty only when necessary to prevent the imposition of greater restrictions. The protection of individual freedom, however, does not require that the mere power to dominate a field of commerce be prohibited. Individual liberty is sufficiently protected by prohibiting the wrongful use of the power. To prohibit combinations which may be organized for legitimate business purposes because of the mere power which they acquire is to use a statute designed to protect and foster enterprise as a means of severely limiting enterprise.[1]

The proposed rule cannot be upheld on the ground that the acquisition of a dominating power over a field of business indicates a purpose of restraining trade. The dominion acquired over the field of business may be evidence of an intention to restrain trade, as the Supreme Court has held in the Standard Oil,[2] Tobacco,[3] and Reading[4] cases. To hold it conclusive evidence of an intent to restrain trade, however, would violate the principle that a person is presumed innocent until proved guilty.[5] The unreasonableness

[1] In the Standard Oil and Tobacco cases the court clearly recognized that to interpret the restrictions imposed by the statute too broadly would be to defeat the purposes of the statute. The rule of reason was announced in order to avoid an interpretation of the statute which, under the guise of prohibiting restraints of trade, would impose innumerable and intolerable restrictions upon the freedom to do business. In the Tobacco case the court, referring to the holding in the Standard Oil case, said (221 U.S. 106 at pp. 179–80): "It was held . . . . that the duty to interpret, which inevitably arose from the general character of the term restraint of trade, required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult, if not impossible, any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect. . . . . The necessity for not departing in this case from the standard of the rule of reason, which is universal in its application, is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade, which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us."

[2] 221 U.S. 1 at p. 75. [3] 221 U.S. 106 at p. 182. [4] 226 U.S. 324 at p. 370.

[5] See Judge Sanborn's dissent in the Harvester case (214 Fed. 987 at p. 1003).

of such a rule stands out with particular sharpness in the case of old-established combinations which have demonstrated by good conduct that they have no intent to restrain trade. In such cases the presumption of guilt based on the mere proportion of the business controlled is contrary to facts which are clearly possible of demonstration.

IV

Taking up the objections to the legality of the combination of competitors from the standpoint of those who deny that illegal practices are necessary to violate the statute, we find that the first question is whether the mere elimination or substantial restriction of competition in a field of business resulting from the combination of competitors constitutes a restraint of trade because of its effect upon the general progress of industry and upon the incentive to serve the public. The question has never been exhaustively considered by the courts, although frequent statements are found in the cases that it is the policy of the law to encourage competition and that the law regards impediments to the general prevalence of competition as restraints of trade, and although among the reasons given for regarding impediments to the general prevalence of competition as restraints of trade are the detrimental effects of the absence or limitation of competition upon technical progress and upon the incentive to serve the public efficiently. In the recent Union Pacific case[1] the Supreme Court expressly accepts the effect of the consolidation upon the incentive for efficient service as one of the grounds for holding the consolidation illegal.

From the standpoint of economics there is no reason why restraint of trade should be understood to mean only such things as the exaction of exorbitant prices, undue restriction of output, deliberate and unreasonable deterioration of goods or service, the use of unfair competitive methods toward competitors or prospective competitors, the binding of others by unreasonable restrictive contracts, etc. These are the most clear-cut and definite forms of restraint, it is true. Their effects can be most clearly seen, their existence most easily ascertained. Nevertheless the weakening

[1] 226 U.S. 61 at p. 88 (1912).

of the incentives which stimulate technical progress and the desire to serve the public impede trade in quite as real a way as the more definite forms of restraint. If restraint of trade means impediments upon trade, then impairing the stimuli to technical progress and good service must be a restraint of trade. The fact that a combination does nothing to interfere with the restoration of the stimuli to technical development and to better service is immaterial if the combination created the situation which weakened the stimuli.

From the standpoint of law the question is: What is the probability that a weakening of the stimuli to technical development and of the incentive to give the best possible service will result from a combination eliminating or substantially limiting competition in a field of business? Is the probability great enough to justify condemning the combination?

When the question is put to the courts in this form, it is extremely doubtful if they will feel warranted in condemning the combination. It is true that the Union Pacific case apparently authorizes a contrary view. Among the reasons for holding the consolidation of the Union Pacific and Southern Pacific illegal the court gave:[1]

> It [the consolidation] directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to and prompt adjustment of the demands of patrons for losses, and in these respects puts interstate commerce under restraint.

Experience, however, seems to show that competition is swift to spring up after the establishment of combinations, and, although this competition often has little influence upon prices, it appears sufficient to stimulate technical development and to maintain an incentive to give good service. In view of the great probability that competition will not remain so feeble that the stimuli to progress and attentive service will be impaired, it seems improbable that courts will be willing to hold combinations illegal because of this possibility. The competition required to maintain a strong incentive to give good service, however, is probably stronger than that necessary to prevent technical stagnation, and the courts may

[1] *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61 at p. 88.

follow the Supreme Court in the Union Pacific case and hold that the possible effects of powerful combinations upon the incentive to give good service brings them within the prohibitions of the statute.[1]

V

The mere combination of competitors is said to violate the statute, in the second place, when it creates a dominating power over a field of business or at least when it presents a dangerous probability of developing a dominating control over the field of business. The danger that dominating power over a field of business will be exercised oppressively is said to make the mere acquisition of such power by means of combination illegal, regardless of

[1] It is possible to argue that the substantial limitation upon competition in a field of business as a result of a combination of competitors is illegal, even though the prices charged by the combination are no more than reasonable, on the ground that the public is entitled to the benefit of competition, which might drive prices below a reasonable level. In other words, the public is entitled to the benefit of cut-throat competition, and to deprive the public of this benefit is a restraint of trade, even though, at the best, the public would enjoy cut-throat prices only temporarily and might in the end be compelled to give all or more than it gained in higher prices or creditors' losses. Authority for this argument is found in the Trans-Missouri Freight Association and Joint-Traffic Association cases. In each of these cases it was earnestly pressed that, since the railroads had the right to charge reasonable rates, they had the right to combine in order to maintain such rates, that the rates actually fixed by the combinations were reasonable, that combinations were necessary in order to maintain reasonable rates and to prevent destructive competition which would result in great loss and damage to the roads, impairment of the efficiency of service, and concentration of control of the railroad system in a few powerful survivors who could raise rates to suit themselves—precisely the result which the statute was designed to prevent. The court, however, answered that the fact that each company had the right to charge reasonable rates did not give it the right to enter into an agreement not to take less (*United States* v. *Trans-Missouri Traffic Association*, 166 U.S. 290 at p. 339). If the policy of the act should lead to disaster, the remedy is in Congress, not the court (Freight Association case, 166 U.S. 339, and Joint-Traffic Association case, 171 U.S. 505 at p. 577).

It is doubtful whether the court would uphold this doctrine under the "rule of reason." A lower court in *United States* v. *Hamburgh-American Line*, 216 Fed. 971, and *United States* v. *Prince Line Ltd.*, 220 Fed. 230, decided contrary to the Freight Association and Joint-Traffic Association cases on precisely the same point. Other cases holding that the restriction of cut-throat competition is not restraint of trade are: *Hare* v. *Railway Co.*, 2 Johns and H. 8; *Chappell* v. *Brockway*, 21 Wend. 157 (1839); *Manchester, etc., R. Co.* v. *Concord R. Co.*, 66 N.H. 127 (1889); *Rafferty* v. *Buffalo City Gas Co.*, 37 App. Div. (N.Y.) 618 (1899); *John D. Parke & Sons Co.* v. *National Wholesale Druggists Association*, 175 N.Y. 1.

whether the power has been oppressively exercised or not.[1] This question should be examined in the light of the meaning attached to restraint of trade at common law.

The question at common law, except in conspiracy cases (of which there were practically none), was not whether the agreement or combination subjected the parties to a liability or a penalty, but whether it was contrary to public policy. It was a question, not of punishing the parties, but of determining whether the agreement was of such a character as the courts would enforce.

In determining whether or not an agreement or combination was contrary to public policy, the courts appear to have looked, not to the actually realized effects of the agreement or combination, but to the effects which might reasonably be expected to follow from it. Had the courts been confronted with the duty of inflicting a penalty, they might have insisted upon actual proof of wrong committed before holding the defendant. The question being merely whether the agreement was or was not in accord with public policy, the courts not unreasonably took the stand that the test of public policy was what was *likely* to be done under the agreement, not what *in fact* had been done. The courts noted that, when competition

[1] The question whether the acquisition of a dominating power over a field business by normal increase in a business not fostered by unfair competitive methods or by the absorption of other enterprises is legal has never been presented for decision. There are a number of *dicta*, however, to the effect that there is no limit to the size to which a business might grow by "normal" methods. In the Standard Oil case the court said that nowhere at common law can there be found a prohibition against the creation of a monopoly by an individual, that the prohibitions of the common law against individuals were directed, not against the creation of a monopoly, but against acts which produced the consequences of monopoly, and that this restriction of the prohibitions to avoid the inclusion of the mere growth of individual enterprises was necessary to avoid undue restriction upon individual freedom (221 U.S. 1 at pp. 55, 56). The court held that the words "to monopolize" and "monopolize" in the second section referred, not to the growth of business by normal methods no matter how large the enterprise became, but to growth by abnormal methods which would be considered restraints of trade. The purpose of the second section was to apply to individuals the prohibitions which the first section applied to combinations (221 U.S. 1 at pp. 61, 62). In the Harvester case the district court, although holding the combination illegal irrespective of its practices, stated that there was no limit under our law to which a business might not independently grow (214 Fed. 897 at p. 1000). In the Eastman Kodak case it is also stated that there is no limit to which a business may not grow by normal methods (226 Fed. 52 at p. 80).

was substantially eliminated in a field of business, it was reasonable to expect, taking human nature as it is, that the power thus secured over the market would be exercised to the injury of the public, and hence arose the rule that combinations or agreements substantially eliminating competition in a field of business are contrary to public policy, irrespective of their actual effects, because of the results which are likely to follow from them. In making the probable results of the agreement the test of its conformity to public policy, the courts merely followed their general practice in determining whether or not an agreement is contrary to public policy. In every case the mere reasonable probability that the agreement will produce results regarded as contrary to public policy is sufficient to vitiate it.

The cases holding agreements contrary to public policy because of their probable effects upon trade are numerous:

Atcheson v. *Mallon*[1] was an action for an accounting on an agreement between two bidders for the collection of the town taxes to share profits and losses. It appeared that both parties put in proposals, that they had shown each other their proposed bids before submission, and it did not appear that any change had been made in them in consequence of the mutual knowledge. The court said:

> It is not necessary, for the determination of this case, to inquire whether the effect of the agreement between the parties was, in fact, detrimental to the town of Oswegatchie. The true inquiry is, is it the natural tendency of such agreements to injuriously influence the public interests? The rule is that agreements which in their necessary operation upon the action of the parties tend to restrain their natural rivalry and competition, and thus result in the disadvantage of the public or of third parties, are against the principles of sound public policy and are void.[2]

Anderson v. *Jett*[3] involved an agreement between the owners of two steamboats, the only rivals in the trade, to share net profits in fixed proportion, each boat, however, to bear its own expenses. In event of the owner of either going out of business, notice was to

[1] 43 N.Y. 147 (1870).

[2] 43 N.Y. 147 at p. 149.

[3] 89 Ky. 375 (1889).

be given the other party and the retiring party was not to engage in the trade within a year. The court said:

That public policy that encourages fair dealing, honest thrift, and enterprise among the citizens of the Commonwealth, and is opposed to monopolies and combinations because unfriendly to such fair dealing, thrift, and enterprise, declares all combinations whose object is to destroy or impede free competition between the several lines of business engaged in utterly void. The combination or agreement, whether or not in the particular instance it has the desired effect, is void.[1]

Judd v. *Harrington*[2] involved a combination of brokers and dealers in, and butchers of, sheep and lambs for the alleged purpose of guarding their business interests from loss by unreasonable competition. The brokers agreed to sell only to members of the butchers' association and the butchers to purchase only from members of the brokers' association. The brokers agreed to pool their commissions, except such as were paid to the butchers' association. The court said:

The real purpose and intent of the agreement was to suppress competition in an article of food, *and as such agreements tend to enhance the price, they are regarded as detrimental to the public interest* and forbidden by public policy. . . . . Courts will not aid parties seeking to enforce such an agreement, irrespective of the question whether it in fact produced the evil results to which it tended or was harmless. It is said that the purpose was to facilitate the transaction of business and save useless expense. It is quite likely that the agreement did enable the parties to transact their business with less labor and expense, and that may be said of nearly all combinations; but that circumstance cannot save them from condemnation when they tend to prejudice the public. *The illegal character of the agreement appeared upon its face and was a necessary legal conclusion from its provisions.*[3]

In holding contrary to public policy an agreement between substantially all salt producers in a large salt-producing territory for the purpose of regulating the price and the grade of salt, the Supreme Court of Ohio in *Central Ohio Salt Co.* v. *Guthrie* said:

The clear tendency of such an agreement is to establish a monopoly and to destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed or that the price of the commodity

[1] 89 Ky. 375 at p. 380.

[2] 139 N.Y. 105 (1893).

[3] Italics are mine.

was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public, it is enough that the inevitable tendency of such contracts is injurious to the public.[1]

People v. *Sheldon*[2] involved an agreement between all the retail coal dealers at Lockport, except one, by which the retail price of coal was to be fixed and kept uniform. The agreement provided that the price should at all times be reasonable and should exceed the current price at Rochester and Buffalo by not more than the additional freight. Certain members of the association were indicted under a section of the penal code making it a misdemeanor for two or more to conspire "to commit an act injurious to the public health, to public morals, or to trade or commerce." The question was whether there was a conspiracy. The trial judge charged that, if the agreement was entered into for the purpose of controlling the price of coal and eliminating competition between the parties, it was illegal and that acts done by a combination in pursuance of it constituted a conspiracy. The Court of Appeals sustained the trial court in holding the agreement illegal, in spite of the fact that it appeared that no injury had resulted from the agreement. The court said:

If the validity and legality of an agreement having for its object the prevention of competition between dealers in the same commodity depend upon what may be done under the agreement, and it is to be adjudged valid or invalid according to the fact whether it is made the means for raising the price of a commodity beyond its normal and reasonable value, then it would be difficult to sustain this conviction, *for it affirmatively appears that the price fixed for coal by the exchange did not exceed what would afford a reasonable profit to the dealers*. . . . But the question here does not turn on the point whether the agreement between the retail dealers in coal did, as a matter of fact, result in injury to the public or to the community in Lockport. The question is, Was the agreement one, in view of what might have been done under it and the fact that it was an agreement the effect of which was to prevent competition among the coal dealers, upon which the law affixes the hand of condemnation, and which it will not permit? It has hitherto been an accepted maxim in political economy that "competition is the life of trade." The courts have acted upon, and adopted, this maxim in passing upon the validity of agreements the design of which was tc prevent competition in trade, and have held such

[1] 35 Ohio St. 666 at p. 672.

[2] 137 N.Y. 251.

agreements to be invalid. . . . . The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are injuriously used. . . . . If agreements and combinations to prevent competition in prices are, or may be, hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult, in any case, to establish the invalidity, although the moral evidence might be very convincing. We are of opinion that the principle upon which the case was submitted to the jury is sanctioned by the decisions in this state, and that the jury were properly instructed that, if the purpose of the agreement were to prevent competition in the price of coal between the retail dealers, it was illegal and justified the conviction of the defendants.[1]

The foregoing cases all involve combinations in which the combining enterprises remained independent. The rule has been applied also to consolidations involving unification of ownership and of operation. The two leading cases are *Richardson* v. *Buhl*[2] (Diamond Match case) and *State* v. *Standard Oil Co.*[3] Both cases involved the legality of the absorption of certain companies by combinations. The gist of opinion in *Richardson* v. *Buhl*, on the criterion by which combinations are to be judged, is quoted in *State* v. *Standard Oil Co.* case. In this case the court said:

Much has been said in favor of the objects of the Standard Oil Trust and what it has accomplished. It may be true that it has improved the quality and cheapened the cost of petroleum and its products to the consumer. But such is not one of the usual or general results of monopoly; *and it is the policy of the law to regard not what may but what usually happens.* Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others. The claim of having cheapened the price to the consumer is the usual pretext on which monopolies of this kind are defended and is well answered in *Richardson* v. *Buhl* (77 Mich. 632). After commenting on the tendency of the combination known as the Diamond Match Company to prevent fair competition and to control prices, Champlin, J., said: "It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. *The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree.*[4]

A *dictum* in *Harding* v. *American Glucose Co.*[5] supports the same view. In this case the execution of an option which the combina-

[1] Italics are mine.
[2] 77 Mich. 632.
[3] 49 Ohio St. 137 (1892).
[4] Italics are mine.
[5] 182 Ill. 551 (1899).

tion had secured on the plant of a Peoria corporation was enjoined on the ground that the combination violated the Illinois anti-trust law. Referring to the legality of combinations at common law, however, the court said:

The material consideration in the case of such combinations is, as a general thing, *not that prices are raised, but that it rests in the power and discretion of the trust or corporation taking all the plants of the several corporations to raise prices.* . . . .

In this case the proof showed that upon the completion of the new organization the price of glucose and its products had been increased.[1]

[1] Other cases on the proposition that the probable effects of combinations are sufficient to bring the combinations within the ban of public policy are:

Hilton v. *Eckersley*, 6 E. and B. 47 (1855). Lord Campbell, C. J., construing the agreement in question (which was held unenforceable), said (p. 65): "I do not think that any averment is necessary as to what has been done under it, or as to any mischief which it has already produced. We are to consider what may be done under it, and what mischief may thus arise. . . . . "

Nester v. *Continental Brewing Co.*, 161 Pa. St. 481 (1894):

"The test question, in every case like the present, is whether or not a contract in restraint of trade exists which is injurious to the public interests. If injurious, it is void as against public policy. Courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the natural tendency of such contracts is injurious."

Brown v. *Jacobs' Pharmacy Co.*, 115 Ga. 429 (1902) at p. 434:

"It is the nature or character and tendency of the agreement which renders it objectionable, whether in fact the parties to it succeed in restraining trade generally, or stifling competition or not."

In *Anderson* v. *Shawnee Compress Co.*, 17 Ark. 231 (1906), referring to contracts in restraint of trade, the court said:

"It is immaterial in determining the legality of such contracts whether or not it was entered into with any evil intent, but the material consideration is its injurious tendency and the power thereby given to control prices. Nor, in order to vitiate a contract, is it essential that its result should be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages derived from free competition."

Some courts, it is true, hold, even with respect to the question whether or not an agreement did or did not violate public policy, that the mere undue power over trade is insufficient. These courts, however, are decidedly in the minority The most conservative view is that of the Massachusetts court, which has held that even an actual raising of prices is immaterial so long as the combine does not look to affecting outside competition.

In *Central Shade Roller Co.* v. *Cushman*, 143 Mass. 353 (1887), the legality of a combination of three manufacturers of roller shades who formed a corporation to take their entire output for three years at a price subject to the control of three-fourths

In the recent Standard Oil dissolution suit the Supreme Court examined the meaning of restraint of trade at common law. The court found that the phrase was not confined to acts or agreements as a result of which actual impediments had been imposed upon trade, but that it also included acts or agreements which unduly restricted competitive conditions or which gave evidence of a purpose to place unreasonable impediments upon trade, because of the natural *tendency* of these acts and agreements to result in evils which were regarded as contrary to public policy. The court said:

It came, moreover, to pass that contracts or acts which it was considered had a monopolistic *tendency*, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade and therefore as being in restraint of trade.[1]

And again:

Without going into detail, and but briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which *it was thought* would flow from the undue limitation of competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably

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of the stockholders, the manufacturers to act simply as selling agents of the corporation, was under consideration. The court said: "It [the agreement] does not look to affecting competition from outside—the parties have a monopoly of their patents—but only to restrict competition in price between themselves. Even if such an agreement tends to raise the price of the commodity, it is one which the parties have a right to make. To hold otherwise would be to impair the right of persons to make contracts, and to put a price on the products of their own industry.

"But we cannot assume that the purpose and effect of the combination are to unduly raise the price of the commodity. A natural purpose and a natural effect are to maintain a fair and uniform price, and to prevent the injurious effects both to producers and consumers of fluctuating prices caused by undue competition. When it appears that the combination is used to the public detriment, a different question will be presented from that now before us. The contract is apparently beneficial to the combination and not necessarily injurious to the public, and we know of no authority or reason for holding it to be invalid as in restraint of trade or against public policy."

[1] *Standard Oil Co.* v. *U.S.*, 221 U.S. 1 at p. 57 (italics are mine).

forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and *tending to bring about the evils*, such as enhancement of prices, which were considered to be against public policy.[1]

It may be objected to these common-law cases that in every instance a purpose to restrain trade is clearly evident and that, therefore, a condemnation of the agreements because of their *probable* effects was justifiable, but that it does not follow that a similar condemnation of an agreement or combination because of its probable consequences is justified when a purpose to place unreasonable impediments upon trade is not evident. It is contended that the consolidation of competitors into a single operating organization which may be for the purpose of creating more efficient production machinery as well as to control the market offers in itself no evidence of an illegal purpose.

This attempt to distinguish between the probability of evil results following from an illegal purpose and from an undue control over the market is strained and artificial. Evidence of a purpose unreasonably to restrain trade may render otherwise innocent acts illegal[2] and may be important in doubtful cases.[3] It is not, however, an adequate test to determine the probability of oppressive practices following the formation of powerful combinations. In the first place, few, if any, combinations involving substantial control of the market are formed with unmixed motives. The founders have in mind the advantages of a dominant position in the market as well as the operating economies of combination. It is probably true that most combinations have been carried farther than was essential to realize the greatest operating economy, in order to obtain the advantages of great power in the market. In the second place, a clear purpose to dominate the market is not self-evident in combinations in which the individual combining enterprises lose their independence and are consolidated into a

[1] 221 U.S. 58 (italics are mine).

[2] *Swift & Co.* v. *United States*, 196 U.S. 375; *United States* v. *St. Louis Terminal Association*, 224 U.S. 383 at p. 394.

[3] *United States* v. *Reading Co.*, 226 U.S. 324 at p. 370.

single enterprise involving unity of ownership and of operating organization. It is always possible to maintain that these consolidations are formed for the purpose, not of gaining control over the market, but of creating more efficient productive machinery. The use of evident purpose as a test of the likelihood of evil effects resulting from the combination would simply be an inducement to combination in the form of consolidations, instead of price-fixing agreements, pools, and other forms of combination, in order to cloak the real illegal purpose. Even in the case of such forms of combination as price-fixing agreements and pools in which an illegal purpose is more evident, the attempt would be made (as it was successfully made in the Hamburgh-American Line and the Prince Line cases) to justify the combination as simply designed to prevent cut-throat competition and to eliminate the wastes of competitive marketing. Finally, even if no wrongful purpose exists when the combination is first formed, if a dominating power is acquired over the market, a wrongful purpose is likely to develop, for possession of great power is a temptation to use it for selfish purposes. If the probability of wrongful practices resulting from a combination is to furnish a basis for holding it illegal, the test should be the power possessed over the market rather than the evidence of an illegal purpose. In putting their decisions upon the basis of the power possessed over the market rather than the purpose evidenced, the courts seem to have adopted the sounder rule.

VI

Does the common-law meaning of restraint of trade, holding combinations possessing undue and dangerous power over a field of business to constitute by that very fact unreasonable restraints of trade, apply in the case of the Sherman act? Did Congress intend by the act to penalize every agreement and combination which at common law was deemed contrary to public policy, or did Congress intend to penalize only such agreements and combinations as in fact placed unreasonable impediments upon trade?

It may be argued that the rule of interpretation that common-law terms when used in statutes are to be understood in their common-law sense, when there is no intention manifest that they

are to be taken in a different sense, does not apply to "restraint of trade" in the Sherman act, because it is unjust to apply to a penal statute a conception of restraint of trade which is very broad because it was developed in cases where the question was not whether the agreement was a tort or a crime, but simply whether it was contrary to public policy. As suggested above, it is said to violate the principle that everyone is presumed innocent until proved guilty to hold one guilty because of mere probability that one will restrain trade.

The decisions, however, seem to establish that "restraint of trade" in the Sherman act means the acts and agreements which were considered contrary to public policy at common law. The question was discussed at length in the Standard Oil case. The court was confronted in this case with the problem of reconciling the sweeping language of the statute with its obvious purpose. On its face the statute prohibits every contract or combination in restraint of trade without qualification. To apply this prohibition literally would have impaired the freedom of trade rather than protected it, because it would have prohibited many normal and legitimate business practices which incidentally restrain trade. Since the law was designed to promote rather than to restrict freedom of trade, the court held that restraint of trade must be understood in a narrower sense. In the absence of any standard of interpretation in the statute, the court held that the term must refer to the restraints which were contrary to public policy at common law and that the standard of interpretation was therefore the standard used by the common law.[1]

[1] The court expressed its understanding of the standard of interpretation which was to be applied to the general language of the statute as follows (221 U.S. 60): "Thus not specifying, but indubitably contemplating and requiring, a standard, it follows that it was intended that the standard of reason which had been applied at the common law, and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

The court based its view that the statute was drawn in the light of the existing conception of the law of restraint of trade also upon the fact that the statute did not use the term in the strict technical sense which applied it to contracts by which one party voluntarily restricted his freedom to pursue a calling or business, but applied it

That restraint of trade, as used in the act, prohibits combinations possessing an undue power over a line of business is indicated by numerous decisions.

In the Trans-Missouri Freight Association and Joint-Traffic Association cases[1] it was strongly urged that the combinations did not in fact restrain trade, because their rates were fair and no effort had been made to drive outsiders out of business. The court, however, held that the general elimination of competition in a field of business was in itself a restraint of trade, because the elimination of competition on a general scale normally results in higher prices and consequently a diminished volume of commerce. The court said in the Joint-Traffic Association case:

> The natural, direct, and immediate effect of competition is, however, to lower rates and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement whose first and direct effect is to prevent this play of competition restrains instead of promoting trade and commerce.[2]

In *Addyston Pipe and Steel Co.* v. *United States* the court expressed its agreement with a *dictum* in Judge Taft's decision in the lower court holding that, irrespective of the reasonableness of the combination's prices, its power over prices constituted it a restraint of trade. Judge Taft said:

> It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in "pay" territory were reasonable. A great many affidavits of purchasers of pipe in "pay" territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that in their opinion the prices at which pipe has been sold by defendants have been reasonable. *We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the*

also to combinations which the court held were theoretically attempts to monopolize. In this the statute followed the decisions and indicated an intention of using the term in the sense understood by the common law. On this point the court said (p. 59): "That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense."

[1] 166 U.S. 290 and 171 U.S. 505, respectively.

[2] 171 U.S. 577.

power to charge unreasonable prices, had they chosen to do so. But if it were important, we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable.[1]

In the Northern Securities case[2] the court held the combination of two parallel and competing railroads by means of a holding company to be a violation of the act, although there had been no increase of rates and no curtailment of service in any respect, on the ground that the restriction of competition between the companies was itself illegal. Mr. Justice Harlan, speaking for court, said:[3]

In all prior cases in this court the Anti-Trust act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce.[4]

National Cotton Oil Company v. *Texas*,[5] which involved the validity under the Fourteenth Amendment of certain Texas anti-trust laws, contains a strong *dictum* on the significance of the mere power to affect prices under the Sherman act, which was quoted with approval by the Supreme Court in the Union Pacific case. Speaking of monopoly, the court said:

Its [monopoly's] dominant thought now is, to quote another, "the notion of exclusiveness or unity"; in other words, the suppression of competition by

[1] Quoted in the opinion of the Supreme Court, 175 U.S. 211 at pp. 237–38 (italics are mine).

[2] 193 U.S. 197.

[3] 93 U.S. 197 at p. 337.

[4] There were four dissenting opinions, and Mr. Justice Brewer wrote an opinion concurring in the result of Mr. Justice Harlan's opinion, but expressing dissent from some of the conclusions. He expressed the opinion that, when no individual investment was involved, but there was a combination of several individuals separately owning stock in two competing railroads to place the control of both in a single corporation organized expressly for that purpose and as a mere instrumentality for the combination of the competing roads, the resulting combination was a restraint of trade by reason of the destruction of competition. He held, however, that the elimination of competition between two such roads as a result of common ownership by a single individual would not violate the act, the act being limited by power of each individual, protected by the Fifth Amendment, to manage his own property and to determine the place and manner of its investment. Corporations, not being endowed with the inalienable rights of natural persons, when used as mere instrumentalities to combine the property of different investors in competing roads, are not protected in the right to hold the property of competing enterprises by the Fifth Amendment.

[5] 197 U.S. 115 (1905).

the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be "unified tactics with regard to prices." It is the power to control prices that makes it the concern of the law to prohibit or limit them. And this concern and the policy based on it has not only expression in the Texas statutes, it has expression in the statutes of other states and in a well-known national enactment. According to them, competition, not combination, should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interest, and the power that such unification gives. And that legislatures may so ordain this court has decided.[1]

The clearest and most emphatic expression of the Supreme Court's view of legality of acquisition of a dominating control over a field of business is found in the Union Pacific case. In spite of the clearness with which the case presents the issue, in spite of the clearness of the court's decision, and in spite, also, of the fact that that decision followed the Standard Oil and Tobacco decisions and represents, therefore, a definition of "the rule of reason," the case has been neglected by the lower courts in considering the point involved.

The case involved a combination of the Union Pacific and Southern Pacific into a single operating organization by the purchase by the Union Pacific of a 46 per cent interest in the Southern Pacific. The roads competed for business large in absolute amount, but small in proportion to their total business. The elimination of competition between the roads far from eliminated all competition at the points where the roads had competed. Not only did water competition exist, but there was also strong rail competition with the Atchison, Topeka & Santa Fe at Los Angeles and San Francisco and with the Northern Pacific at Portland. The combination had not raised rates, service had been substantially improved, and there was no charge of unfair competitive methods.

The court, however, held that the policy of the Sherman act was the maintenance of competition in its general sense, regardless of any beneficial effects produced by combinations substantially abridging competition, because the substantial abridgment of competition *tended* to higher rates and to lessened incentive for

[1] 197 U.S. 129.

efficient service, and because of the power of large combinations to suppress independents. Defining the policy of the act, the court said:

> To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute, and the courts should construe the law with a view to effecting the object of its enactment.[1]

The court stated the applicability of the act to the combination as follows:

> The consolidation of two great competing systems of railroad engaged in interstate commerce, by a transfer to one of a dominating stock interest in the other, creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates. *United States* v. *Joint-Traffic Association, supra*, 577. It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to, and prompt adjustment of, the demands of patrons for losses, and in these respects puts interstate commerce under restraint. Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or create monopoly which determines the applicability of the act.[2]

The opinion of the Supreme Court in the Union Pacific case was followed by the district court in the Harvester case,[3] in which a majority of the court, admitting that the practices of the combination toward its competitors and the public in the main had been fair, held it to violate the statute because it substantially limited competition in the field of business involved.

United States v. *Great Lakes Towing Co.*[4] contains a *dictum* to the effect that, in passing on the legality of combinations, not merely the actually realized effects, but also the probable effects, are to be taken into account.[5] The district court in the Corn Products

[1] 226 U.S. 87. [2] 226 U.S. 88. [3] 214 Fed. 987 (1914). [4] 208 Fed. 733.

[5] 208 Fed. 733 at p. 745: "Whatever may be the views of individual economists, under the federal statutory policy normal and healthy competition is the law of trade; and such evils as may result from such competition must be considered less than those liable to follow a complete unification of interests and the power such unification gives. The evil of unification lies in the temptation to higher rates and lessened regard for the public interests; *and the tendency to this evil must be recognized, even though not in a given case realized by experience*" (italics are mine).

Refining case[1] expressed the opinion that the decisions indicated that the power of a combination over a line of commerce may condemn it independently of its practices, but the point was not presented for decision in the case.

It is interesting and important to note that in the most important recent case in which the Supreme Court sustained a combination—the St. Louis Terminal Railroad Association case[2]—the ground for sustaining the combination was that it tended to *promote* rather than to abridge competition. This case has been frequently quoted as authority for the proposition that mere power over the market does not condemn a combination, but the decision, as a matter of fact, was based upon peculiar facts in the case which caused the combination to promote rather than to hinder competition.

VII

Further light is thrown upon the meaning probably intended by Congress by "restraint of trade" by an examination of the administrative problems involved in the application of the conflicting concepts—the concept that restraint of trade means only actual impediments to the freedom to buy or sell or conduct one's business as one sees fit, and the concept that it includes the acquisition of a dominating power over the market by the combination of competitors.

If the actual impediment concept of restraint of trade is to be applied, the courts must have a practical test by which to determine whether the practices of a combination impose unreasonable restrictions upon the freedom of others. The principal point to be noted in this connection is that the raising of prices to an unreasonable level by a combination of competitors is well recognized as an unreasonable impediment to trade.[3] When a combination so dominates the market that it is substantially able to fix the market price, a rule restricting restraint of trade to definite impediments upon commerce puts in question the reasonableness of the prices

[1] 234 Fed. 964 at p. 1011.

[2] 224 U.S. 383.

[3] *Chattanooga Foundry and Pipe Works* v. *Atlanta*, 203 U.S. 390; *Thomsen* v. *Cayser*, 61 U.S.L. ed. 353 at p. 360.

charged by the combination. In case the combination's practices toward its competitors have been fair, the reasonableness of the prices exacted by it may constitute the sole issue.

The problems involved in the determination of the reasonableness of the prices charged by a combination appear to have been overlooked by courts which have advocated the actual impediment concept of restraint of trade. In some cases the reasonableness of prices might be determined by comparing the combination's present prices with prices before the combination was formed, allowing for changes in wages and in the cost of materials. In most cases, however, the determination of the fairness of prices would necessitate the ascertainment of the cost of producing and marketing, for the prices before the formation of the combination would not be a satisfactory criterion of what is reasonable. These prices might be too low on account of cut-throat competition or faulty cost accounting or too high on account of a gentlemen's agreement. Changes in processes, in addition to changes in wages and material costs, introduce changes in cost. In the case of the consolidation of independent enterprises into a single operating organization the changes in process are likely to be particularly important.

The determination of the cost of production and marketing of the goods involves the ascertainment of the fair value of property used in producing them, of the rate of return to which the combination is entitled on this value, of the operating expenses during the period under consideration, and of the apportionment of overhead and operating expenses to the various products and to the various grades of each product. After the complicated principles by which the fair value of property is determined and in accordance with which overhead and current expense should be distributed to the various lines of product have been worked out, there remains the almost equally difficult task of collecting the financial and engineering data necessary to show what the costs in the particular case are. The courts are not fitted by training and experience to pass on these questions, and the judicial machinery is not organized adequately to deal with them.

The use of the power which a combination possesses over the market to force the public to accept inadequate service also is

recognized as a restraint of trade. In addition to ascertaining the reasonableness of prices, therefore, the courts would also be required to pass on the adequacy of the service rendered by the combination. In many cases in which the inadequacy was flagrant the proof of it would be simple. In other cases the proof might be extremely difficult, and it might be necessary to determine fairly definitely what was the minimum of reasonably adequate service, before the adequacy of the service actually rendered could be ascertained. The questions which might arise with respect to the adequacy of service are numerous. They include such questions as whether a reasonably wide variety of goods is offered, whether deliveries are reasonably reliable and prompt and credit terms reasonably liberal, whether complaints receive proper attention, whether an adequate stock of repair parts is carried, whether proper expert assistance is rendered customers to aid them in setting up their apparatus, to instruct them in its operation, and to assist them in its repair. Many of these special services would involve special price problems. The question of adequacy of service would probably also include the adequacy of production facilities. The courts would be required to decide what constitutes an adequately sized plant in relation to the demand, what reserve capacity, if any, should be provided to carry the "peak load" of prosperous times.

The problems of prices and service which arise in application of a rule restricting restraint of trade to actual impediments on trade strongly indicate that Congress did not intend restraint of trade to be understood in this narrow sense. The problems are too technical. They demand specialized training and experience which courts do not have. They involve a detailed prying into the business of the combinations for which the judicial machinery is not adapted.

One reason why a rule confining restraint of trade to actual impediments upon trade is so strongly urged is the feeling that, if only acts of combinations rather than combinations themselves are illegal, the remedy will be confined to the enjoining of the acts and that the combinations will escape dissolution. This, however, is a false hope. As was pointed out above, it is impossible to prevent the charging of unreasonable prices by injunction. To a great

extent, also, it is impossible to compel adequate service to the public by injunction. The only remedy against exorbitant prices and inadequate service which a court can administer in most cases is dissolution, and this will have to be resorted to under a rule restricting restraint of trade to actual impediments upon commerce, as well as under one which recognizes the mere power of combinations as a justification for dissolving them.

The rule which holds combinations illegal because of the mere power possessed over the market escapes the difficulties of the actual impediment concept because, under it, mere proof of the combination's power to dominate the market is sufficient. The rule is criticized, however, on the ground that a combination cannot tell what proportion of a line of business it may control. It would be possible for the court to rule that the control of more than a specified percentage of a field of business would be considered *prima facie* evidence of power to dominate the market, but there is little likelihood of the court committing itself on this point.[1]

The importance of this objection to the indefiniteness of the rule, however, has been exaggerated. No one knows better than the business man himself what proportion of the field of business he must control in order to dominate the market. No one knows better than he himself his own position in the market. It is a

[1] The application of a definite proportional test, too, would not be without difficulties. A combination might concentrate its business in certain sections or localities and by tacit consent of other firms be allowed the control of such markets. The application of a proportional test in such cases would involve the determination of what the market unit was in which the combine's proportion of the business must not exceed a given amount.

A similar problem would arise in cases in which commodities with different grades were involved. Between any two consecutive grades competition might exist. Between grades on the extremes, the best and poorest, competition might be substantially *nil*. If a combination confined its production to certain grades, the comparison of its production with the total production of all grades would obviously be unfair, for it would lead to an unduly low percentage figure indicating possibly no undue control, when, as a matter of fact, in certain grades the combination might possess a substantial control. To compare the combine's production with the total production of these identical grades, on the other hand, would exaggerate the combination's importance in the market. In a more or less arbitrary manner a decision would have to be made with respect to what part of the total production of the industry the combination was in active competition.

subject of constant study for him. In view of the extreme reluctance of courts to dissolve efficient organizations, except when required beyond all doubt, there is little danger of overstepping the rule when the organizers of the combination have an honest intention of keeping within it.

A possible source of indefiniteness in a rule holding illegal the acquisition of undue control over a market by means of combination is raised by the question: When is control over the market acquired by means of combination of independent enterprises, and when by means of the normal growth of a single enterprise? Assume, for example, that an enterprise controls 70 per cent of a line of business, which is sufficient to enable it to raise prices. If this control was acquired by the consolidation of enterprises controlling 50 or 60 per cent of the business and subsequent growth, it would probably be regarded as a case of control acquired by combination and therefore held illegal. On the other hand, if several producers controlling not more than 10 or 15 per cent of a line of business united and by their skill and energy, without the absorption of any additional enterprises, eventually acquired 70 per cent of the business in the commodity, such an enterprise would probably be classed as an instance of expansion by normal growth, despite the combination at the outset. But where between these two extremes should be drawn the line which separates expansion by combination from expansion by normal growth?

VIII

The foregoing analysis indicates that combinations of competitors probably are illegal under the Sherman act when possessing power to dominate a field of business or possibly, also, when the likelihood is great that they will acquire a dominating control over a field of business. It seems, also, to be immaterial that the combination is not a mere price-fixing arrangement, but a consolidation of independent enterprises forming a superior operating organization and serving a legitimate business purpose. The Supreme Court clearly stated in the Standard Oil and Tobacco cases that the form of the combination was immaterial.[1] It has

[1] *Standard Oil Co.* v. *United States*, 221 U.S. 1 at p. 39; *United States* v. *American Tobacco Co.*, 221 U.S. 106 at p. 180.

held, also, on a number of occasions that the law is its own measure of right and wrong and that the fact that a combination is justified by other criteria of reasonableness than those recognized by the statute is immaterial.[1] The essential question is: Does the combination bring about results which the statute forbids? If the results forbidden include the acquisition of a dominating control over the market by means of the combination of competitors, consolidations of competitors into a single operating organization creating great economies are within the statute, as well as mere price-fixing agreements.

From the economic standpoint this rule is open to severe criticism because it fails to distinguish the ever-increasing number of combinations which serve a legitimate business purpose from those which serve none. Each type is equally liable to dissolution under this rule. The same criticism applies, however, with only slightly less strength, to the rule which makes the legality of combinations depend upon their conduct. Dissolution under this rule does not mean that the combination serves no useful purpose, but that it has been guilty of wrongful practices. Highly useful combinations may be dissolved under this rule, as under the other, simply as a means of preventing probable future violations of the act.

From the legal and administrative standpoint, however, the rule which renders subject to dissolution all combinations possessing a dominating power over a field of business is superior, because it furnishes a broader basis for regulation of combinations. If the regulation relates simply to the practices of combinations, the regulation must be confined to such as Congress has authority to enact or authorize under the commerce clause as limited by the Fifth Amendment—that is, it must be regulation of commerce and it must not, according to the standards of the courts, unreasonably abridge the combination's rights of liberty and property.

[1] *United States* v. *Standard Sanitary Manufacturing Co.*, 226 U.S. 20 at p. 49; *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 at p. 339; *United States* v. *Joint-Traffic Association*, 171 U.S. 505 at p. 577; *United States* v. *Northern Securities Co.*, 193 U.S. 197 at p. 339; *United States* v. *American Tobacco Co.*, 221 U.S. 106 at p. 179; *National Cotton Oil Co.* v. *Texas*, 197 U.S. 115 at p. 129; *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61 at p. 83; *Thomsen* v. *Cayser*, 61 U.S.L. ed. 353 at p. 359.

If all combinations possessing control of a field of business are illegal and subject to dissolution, it is possible to give the Trade Commission power to pass on exemptions from the rule and to permit combinations shown to be in the interest of the public to be formed or to continue to exist on compliance with such conditions as the Trade Commission may deem expedient. These conditions are not limited by the commerce clause and the Fifth Amendment. The government may prescribe whatever conditions the combination is willing to accept as a condition of its license to continue business undissolved.

The situation is analogous to the authority possessed by states or municipalities over public utilities by virtue of the police power and of franchise provisions. The power to regulate under the police power is limited by the utility's property rights. The power to regulate under the franchise is limited only by the terms of the franchise.

By means of this broader power over combinations which it is possible to procure by agreement with the combination it should be possible to some extent to remove the twilight zones between what is and what is not permissible under the commerce clause and the Fifth Amendment. Power could be acquired to make regulations which could not be upheld as regulations of commerce, such as regulations pertaining to manufacturing operations and processes. Under the protection afforded by the Fifth Amendment the regulations of the regulating body must be "reasonable." In the case of methods of conducting a business there is often more than one "reasonable" method. If the method already used by the business is "reasonable," the courts are inclined to regard orders requiring the use of a different method as "unreasonable," in spite of the fact that the use of the new method may result in substantial advantage to the public at relatively slight inconvenience to the business. By agreement with the combination more exact and detailed control over its business may be acquired and wider power may be obtained to determine specifically the procedure which shall be followed. By this means the regulating body could acquire over the combination the authority necessary to keep pace with the constant changes in industrial and commercial processes and condi-

tions. This is of particular importance in maintaining adequacy of service. The standard of service which the public is limited to demand by the Fifth Amendment is "reasonably adequate." The courts are inclined to accept the prevailing type of service as the test for reasonably adequate service. Not until a new and superior type of service has become the prevailing type do the courts adopt it as the minimum of reasonably adequate service. On account of the conservatism of the courts with respect to standards of service, it is desirable for the regulating body to have authority to compel the adherence to a higher standard than merely reasonably adequate service, and to be able to compel the use of the "most modern," "most approved," equipment, methods, and processes that are practical under the circumstances.[1]

Whichever concept of restraint of trade the courts adopt, it is evident that additional legislation is imperative. The courts are confronted with a dilemma in choosing between the two opposing concepts. If they hold that all combinations of competitors possessing a dominating control over the market are illegal, they destroy many combinations which serve a legitimate economic purpose. If they hold only such combinations illegal as impose unreasonable impediments upon the freedom of others to buy and sell and to conduct their business as they see fit, they adopt a rule which puts dissolution on a slightly less irrational basis than the broader rule, but which in most cases is extremely cumbersome, if not impossible, to administer and which is too narrow to form a satisfactory basis for the regulation of the combinations which it is not expedient to dissolve. If the courts adopt the broad concept of restraint of trade, therefore, legislation is needed to enable useful combinations to escape dissolution and to provide machinery for their regulation. If the narrow concept is adopted, in addition to the provision for the regulation of such combinations as serve a legitimate economic purpose, there is need to enact the broader

[1] Another case of where specific control over the business of combinations is desirable is in the control of technical research. Technical research is unquestionably the antidote for technical stagnation when competition is eliminated. When a combination abolishes competition, the regulating body should have authority to prevent technical stagnation by compelling the setting aside of definite sums for experiment and research.

concept into law, in order to provide a simpler rule for dissolving the combinations which it is deemed desirable to dissolve and to furnish a broader basis for regulating those combinations which it is desired to permit.[1]

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[1] A question may be raised concerning the constitutionality of a statute declaring all combinations of competitors resulting in a substantial control of the market to be a crime or tort, irrespective of the acts of the combination. The question is whether the prohibition of all combinations possessing a dominating power over the market is an appropriate means of preventing undue restraint of trade. In view of the likelihood of great power being used oppressively, there seems no question that it is an appropriate means and it has been so held in many cases. The Joint-Traffic Association case, 171 U.S. 505 at pp. 566–70; *Addyston Pipe and Steel Co.* v. *United States*, 175 U.S. 221 at pp. 228–30; the Northern Securities Co. case, 193 U.S. 197 at p. 337, all uphold the Sherman act, interpreting it as penalizing the mere acquisition by combination of dominant power over trade. The most recent and most emphatic case on this point is *International Harvester Co.* v. *Missouri*, 234 U.S. 199, upholding a Missouri statute making illegal all combinations which tend to lessen "full and free competition," regardless of their effect upon others. These statutes are but one instance of the familiar practice of drawing the line of illegality before actual injury in order to prevent actual injury (cf. Freund: *Standards of American Legislation*, pp. 84–95, 221–22).